

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

HERON COVE ASSOCIATION, et al,

Case No. 1:24-cv-11473-TLL-PTM

Plaintiffs,

Hon. Thomas L. Ludington, District Judge
Hon. Patricia J. Morris, Magistrate Judge

v.

GLADWIN COUNTY BOARD OF
COMMISSIONERS and FOUR LAKES
TASK FORCE

Defendants.

Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Keith T. Brown (84193)
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kbrown@fosterswift.com

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PLAINTIFFS' 7/10/2024 MOTION FOR DISQUALIFICATION
& BRIEF IN SUPPORT

Background

Plaintiffs, through their counsel, FOSTER, SWIFT, COLLINS & SMITH, P.C., move the Court for disqualification pursuant to 28 USC 455 and Canon 3(C)(1)(c) and state as follows:

1. This case arises from the February 6, 2023 decision of the Defendant Gladwin County Board of Commissioners (the “County”) approving the 5-year operation and maintenance and 40-year capital assessment rolls for the Four Lakes Special Assessment District.
2. In 2019, Gladwin County, along with Midland County and through their delegated authority, Defendant Four Lakes Task Force, petitioned the Midland and Gladwin Circuit Courts to set a normal lake level for Secord, Smallwood, Sanford, and Wixom Lakes (the “Four Lakes”), and to approve the boundaries of a special assessment district, pursuant to Part 307 of the Michigan Natural Resources and Environmental Protection Act, Act 451 of 1994, as amended, MCL 307.30701 *et seq.*
3. On May 28, 2019, Midland County Circuit Court Stephen P. Carras entered an order setting normal lake levels for the Lakes and establishing the boundaries of the Four Lakes Special Assessment District. On July 18, 2019 (following an order from the Michigan Supreme Court Administrative Order appointing him to that court), Judge Carras entered that order in Gladwin Circuit Court.
4. In May 2020, the Edenville Dam failed and the Sanford Dam overflowed, resulting in devastating floods. Defendants’ objective shifted to rebuilding the Secord, Smallwood, Sanford, and Edenville Dams, and to restoring the Four Lakes.
5. On February 6, 2024, the County approved the 5-year and maintenance and 40-year capital assessment rolls for the Four Lakes Special Assessment District, levying these assessments on properties within the Four Lakes Special Assessment District.

6. On March 22, 2024, Plaintiffs filed the instant litigation in Gladwin Circuit Court, alleging that the special assessments are a violation of the Michigan Takings Clause pursuant to Const 1963, art 10, §2 and a violation of the United States Constitution pursuant to US Const, Am 5.
7. On May 21, 2024, Plaintiffs filed a first amended complaint.
8. On June 4, 2024, Defendants removed this action to this Court.
9. Upon removal, this action was originally assigned to Judge Matthew F. Leitman and Magistrate Judge Curtis Ivy, Jr.
10. However, this Court issued a Notice of Corrected Judicial Assignment due to Clerical Error on June 5, 2024, which reassigned the matter to Judge Thomas L. Ludington and Magistrate Judge Patricia T. Morris.
11. Judge Ludington owns property in the Four Lakes Special Assessment District, and Defendants have assessed his property.
12. Specifically, Judge Ludington owns Parcel No. 080-012-300-002-00, which has been assessed \$58,710.41 on the capital assessment roll and \$435.66 on the operations and maintenance assessment roll.¹

1

https://experience.arcgis.com/experience/a0e4c726605f4536b46aac7b3d3e078a/?draft=true#data_s=id%3AdataSource_2-18c1c5d2650-layer-15~dataSource_1-18c1c5d2650-layer-15%3A7153

080-012-300-002-00		080-012-300-002-00	
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Assessment Information		Payment Estimate:	
Parcel ID:	080-012-300-002-00	* This amount includes an estimated 5% interest rate	\$3,421.53
Owner:	LUDINGTON, THOMAS L ET UX	Total Capital Assessment Principal Amount (to be financed over a 40 year period)	\$58,710.41
Estimated Annual Operations and Maintenance Assessment			
Apportionment:	0.022928%		
Estimated	\$435.66		

Brief In Support

Law & Argument

13. 28 USC 455 provides, in relevant part:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

14. The purpose of § 455(a) is “to promote public confidence in the integrity of the judicial process” and United States Supreme Court has held that it “does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew.” *Liljeberg v Health Servs. Acquisition Corp*, 486 US 847, 860; 108 S Ct 2194; 100 L Ed 2d 855 (1988).

15. The United States Supreme Court has further held that “recusal [under § 455(a)] is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.” *Id.* at 861 (citation omitted).

16. Moreover, disqualification is proper pursuant to Judicial Canon 3(C)(1)(c), which provides that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances in which: . . .the judge knows that the judge, individually or as a fiduciary, or the judge’s spouse or minor child residing in the judge’s household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.”

17. Because Judge Ludington owns property assessed in the Four Lakes Special Assessment District, disqualification is warranted under § 455(a) because (1) his impartiality might be reasonably questioned; (2) he likely has personal knowledge of disputed evidentiary facts concerning this proceeding; (3) he has a financial interest that could be substantially affected by the outcome of this proceeding; and (4) a reasonable person, knowing all the circumstances, would expect that Judge Ludington would have actual knowledge of the facts of the instant litigation.

18. Pursuant to LR 7.1(a)(2), Plaintiffs sought concurrence in this motion from all Defendants. There was a conference via e-mail between attorneys for Plaintiff and Four Lakes Task Force in which the movant explained the nature of the motion and its legal basis and requested but did not obtain concurrence in the relief sought (Exhibit A). Plaintiff similarly sought concurrence from Gladwin County, but despite reasonable and timely efforts to obtain concurrence via e-mail explaining the nature of the motion and its basis, the movant was unable to conduct a conference (Exhibit B). Gladwin County has not at the time of this writing concurred in the motion.

WHEREFORE, for these reasons, Plaintiffs respectfully request that:

- Judge Ludington be disqualified from this case,
- The court award Plaintiffs' costs and attorney's fees for Defendants' unreasonable withholding of consent pursuant to LR 7.1(a)(3)

FOSTER, SWIFT, COLLINS & SMITH, P.C.

Dated: July 10, 2024

By:



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Laura J. Genovich (P72278)
Keith T. Brown (P84193)
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kbrown@fosterswift.com

89232:00001:200665715-1

EXHIBIT A

From: Colaianne, Joseph W. <jcolaianne@clarkhill.com>
Sent: Sunday, July 7, 2024 10:05 AM
To: Homier, Michael <MHomier@fosterswift.com>
Cc: Spendlove, Amanda <ASpendlove@fosterswift.com>; Larsen, Zachary C. <zlarsen@clarkhill.com>; Brown, Keith <kbrown@fosterswift.com>; Mertins, Paula <pmertins@clarkhill.com>; Genovich, Laura <LGENOVICH@FOSTERSWIFT.COM>; Stawasz, Bethany <bstawasz@clarkhill.com>; Timothy S. Ferrand - Cummings McClorey Davis & Acho PLC (tferrand@cnda-law.com) <tferrand@cnda-law.com>
Subject: RE: Heron Cove v FLTF - Stipulation & Proposed Order for Extending Answer Deadline

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Mike,

I apologize for the delay. I was without internet service, as I am not in the mainland USA currently. We will not concur in your motion seeking to have Judge Ludington recuse himself.

Joseph W. Colaianne

Member

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JColaianne@ClarkHill.com | www.clarkhill.com

From: Homier, Michael <MHomier@fosterswift.com>
Sent: Friday, July 5, 2024 8:18 AM
To: Colaianne, Joseph W. <jcolaianne@clarkhill.com>
Cc: Spendlove, Amanda <ASpendlove@fosterswift.com>; Larsen, Zachary C. <zlarsen@clarkhill.com>; Brown, Keith <kbrown@fosterswift.com>; Mertins, Paula <pmertins@clarkhill.com>; Genovich, Laura <LGENOVICH@FOSTERSWIFT.COM>; Stawasz, Bethany <bstawasz@clarkhill.com>; Timothy S. Ferrand - Cummings McClorey Davis & Acho PLC (tferrand@cnda-law.com) <tferrand@cnda-law.com>
Subject: Re: Heron Cove v FLTF - Stipulation & Proposed Order for Extending Answer Deadline

[External Message]

Thanks Joe. As you suspect, we do not concur. Further, as you know, this case has been assigned to Judge Ludington, who we believe has a financial interest in this case because it appears his home is lake front property within the district. Thus, we believe that Judge Ludington must recuse himself pursuant to 28 USC 455 and we will bring a motion to that effect. Let me know if you will concur in that motion. Thanks.

Michael D. Homier

Shareholder

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Fax: 517.367.7120
mhomier@fosterswift.com
www.fosterswift.com

 Please consider the environment before printing this email.

From: Colaianne, Joseph W. <jcolaianne@clarkhill.com>
Sent: Friday, July 5, 2024 8:12 AM
To: Homier, Michael <MHomier@fosterswift.com>
Cc: Spendlove, Amanda <ASpendlove@fosterswift.com>; Larsen, Zachary C. <zlarsen@clarkhill.com>; Brown, Keith <kbrown@fosterswift.com>; Mertins, Paula <pmertins@clarkhill.com>; Genovich, Laura <LEGENOVICH@FOSTERSWIFT.COM>; Stawasz, Bethany <bstawasz@clarkhill.com>; Timothy S. Ferrand - Cummings McClorey Davis & Acho PLC (tferrand@cnda-law.com) <tferrand@cnda-law.com>
Subject: RE: Heron Cove v FLTF - Stipulation & Proposed Order for Extending Answer Deadline

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Mike,

Good morning. I hope you had a pleasant 4th of July with you family.

As you know, Federal District Court Local Rule 7.1(a) requires that we seek concurrence before filing motions. We will be filing Motions to Dismiss seeking dismissal of both the Midland and Gladwin complaints with prejudice pursuant to Federal Rule 12(b)(1) and 12(b)(6). In addition, we will be filing a separate Motion to Expedite Consideration of the Motions to Dismiss in both matters as well. Please advise if you concur with the proposed actions, or not. (I assume you would not – but as a formality – please respond.)

Joseph W. Colaianne

Member

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JColaianne@ClarkHill.com | www.clarkhill.com

EXHIBIT B

From: Homier, Michael

Sent: Monday, July 8, 2024 5:12 PM

To: Timothy Ferrand <tferrand@cnda-law.com>; Colaianne, Joseph W. <jcolaianne@clarkhill.com>

Cc: Spendlove, Amanda <ASpendlove@fosterswift.com>; Larsen, Zachary C. <zlarsen@clarkhill.com>; Brown, Keith <kbrown@fosterswift.com>; Mertins, Paula <pmertins@clarkhill.com>; Genovich, Laura <LGENOVICH@FOSTERSWIFT.COM>; Stawasz, Bethany <bstawasz@clarkhill.com>; Tara Lange <tlange@cnda-law.com>; Jennifer Burnett <jburnett@cnda-law.com>

Subject: RE: Heron Cove v FLTF - Stipulation & Proposed Order for Extending Answer Deadline

Tim,

As you might imagine, we will not concur. Further, we believe that Judge Ludington owns a house in the SAD and, therefore, has a conflict that requires recusal. We are preparing a motion to that effect and ask for your concurrence. Let me know. Thanks.

Michael D. Homier

Shareholder

Foster Swift Collins & Smith PC

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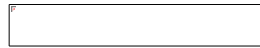
Phone: 616.726.2230; 517.371.8120

Mobile: 517.285.4251

Fax: 517.367.7120

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www.fosterswift.com



 Please consider the environment before printing this email.

From: Timothy Ferrand <tferrand@cnda-law.com>

Sent: Saturday, July 6, 2024 10:05 AM

To: Homier, Michael <MHomier@fosterswift.com>; Colaianne, Joseph W. <jcolaianne@clarkhill.com>

Cc: Spendlove, Amanda <ASpendlove@fosterswift.com>; Larsen, Zachary C. <zlarsen@clarkhill.com>;

Brown, Keith <kbrown@fosterswift.com>; Mertins, Paula <pmertins@clarkhill.com>; Genovich, Laura

<LGENOVICH@FOSTERSWIFT.COM>; Stawasz, Bethany <bstawasz@clarkhill.com>; Tara Lange

<tlange@cnda-law.com>; Jennifer Burnett <jburnett@cnda-law.com>

Subject: RE: Heron Cove v FLTF - Stipulation & Proposed Order for Extending Answer Deadline

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Mike,

I am filing a similar (Rule 12(b)) motion to dismiss on behalf of Midland and Gladwin Counties. Pursuant to LR 7.1, please advise if you will concur in dismissal of the Claims against the Counties. I will also request expedited relief. Thank you.

Timothy S. Ferrand

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